

1978 April 10

[TRIANTAFYLIDIS, P.]

KATARINA SHIPPING INC.,

*Appellants—Applicants,*

v.

THE CARGO ON BOARD THE SHIP “POLY”,

*Respondent.*

*(Application in Civil Appeal No. 5821).*

*Civil Procedure—Appeal—Stay of execution pending appeal—Jurisdiction—Discretion of Court—Principles governing exercise of—Same both in admiralty and in other proceedings—Appeal against directions relating to execution of a consent order for release of cargo—Court’s discretion exercised against stay in the circumstances of this case—Order 35, rules 18 and 19 of the Civil Procedure Rules.*

*Admiralty—Practice—Appeal—Stay of execution pending appeal—Principles applicable—Appeal against directions relating to execution of a consent order for release of cargo—Proper remedy against directions was an application for review and not an appeal—Rule 165 of the Cyprus Admiralty Jurisdiction Order, 1893.*

Following the making of an order, by consent, on December 12, 1977, for the release of the respondent cargo in Admiralty Action No. 232/77, the Marshal of the Admiralty Court of Cyprus applied to the Chief Registrar of the Supreme Court on March 23, 1978 for directions as to whom must the respondent cargo be released, and on production of what documents. On March 24, 1978 a Judge of this Court (who was dealing with the said Admiralty Action) gave directions in answer to the request of the Marshal. An appeal was then filed against the directions given by the trial Judge as above which was followed by an application for stay of execution, pending the determination of the appeal. The application was made *ex parte* and it was refused on the same day by the trial Judge. There followed an identical *ex parte* application before this Court which, having heard counsel, it directed that it should be made by summons (see *The Annual Practice*, 1955, p. 1283).

On the application by summons for stay of execution:

*Held, (after finding that it has jurisdiction to deal with the application and after dealing with the principles governing the exercise of judicial discretion in a matter of this nature—vide pp. 359-61 post).*

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(1) That the proper, in the circumstances, remedy against the said directions was an application for review, under rule 165 of the Cyprus Admiralty Jurisdiction Order 165, and not an appeal.

(2) That these directions were made for the purpose of ensuring the execution of a consent order for the release of the respondent cargo; and that in relation to the making of this order the matter was brought before the Full Bench of the Court, on appeal, (see C.As. Nos. 5783 and 5793) which found that the trial Judge did make an order by consent, for the release of the cargo concerned, on the basis of statements made before him on the date in question by counsel for the parties, which are the same as the parties in this application.

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(3) That if counsel appearing for the appellants wanted to guard against any of the possible adverse contingencies which have been raised before this Court in the course of arguing in support of this application, the proper time to raise such matters was when the statements which led to the making of the aforementioned order by consent, for the release of the cargo, were made; but at that time, none of such matters appears to have been raised.

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(4) That the member of this Court, having been a member of the Full Bench which has dealt with the aforesaid Civil Appeals is not only entitled, but bound, to take judicial notice of the relevant circumstances in which this cargo has come to be still in Cyprus and its fate to be shrouded in uncertainty due to the delay in the execution of the order for its release which was made by consent, on December 12, 1977.

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(5) And that, accordingly, bearing in mind all the above, as well as other relevant considerations, this Court has decided against exercising its discretion in favour of the appellants and has decided to refuse an order for a stay of execution of the

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gave directions in answer to the request of the Marshal. It is common ground that he did so without hearing counsel for the parties. Then the present appeal was filed against the directions given by the trial Judge on March 24, 1978, and on March 31, 1978, an application for stay of execution, pending the determination of the appeal, was made in the first instance to the trial Judge. This application was made *ex parte* and it was refused by a decision given on the same date. 5

On April 6, 1978, an identical *ex parte* application was made to me, and, having heard counsel for the appellants, I directed that it should be made by summons; at the time I made the following order: 10

“*Court:* As it appears from the material before me the order appealed from relates to the execution of an order made by consent in admiralty action No. 232/77 for the release of the defendant cargo. 15

In the circumstances I am of the view that before deciding whether or not to stay, in effect, the execution of the order which was made by consent I must hear the other side too. 20

I direct, therefore, under rule 8 (3) of Order 48 of the Civil Procedure Rules, that this application for stay of execution should be made by summons with notice to the respondent in this appeal and to the Marshal.

In view of the urgency of the matter I hereby abridge, in the exercise of my powers under Order 57 of the Civil Procedure Rules, the relevant time-limits so that if the application by summons is filed and served today it shall be heard on Saturday, April 8, 1978, at 8.30 a.m.; and any opposition thereto should be filed and delivered on April 7, 1978.” 25 30

In relation to my direction that the stay of execution ought to be applied for by summons, and not *ex parte*, it is useful to refer to The Annual Practice, 1955, p. 1283, where it is stated that “Where a stay of execution has been refused by the Court of first instance, application to the C.A. for a stay should be by original motion upon notice to the party entitled to enforce the judgment or order”. 35

The first issue which I have to consider, in relation to whether I should grant a stay of execution of the appealed from order of the trial Judge, is whether I have jurisdiction to do so as a Judge of this Court sitting alone:

5 It is to be noted that had this matter come before me as an appeal from the refusal of the trial Judge to grant a stay of execution then only the "Court" mentioned in the proviso to section 11(2) of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33/64) would have been competent  
10 to deal with it. But I am not dealing with such an appeal now.

Two relevant provisions are rules 18 and 19 of Order 35 of the Civil Procedure Rules, which read as follows:-

15 " 18. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from except so far as the Court appealed from or the Court of Appeal, or a Judge of either Court, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from may direct. Before any order staying  
20 execution is entered, the person obtaining the order shall furnish such security (if any) as may have been directed. If the security is to be given by means of a bond, the bond shall be made to the party in whose favour the decision under appeal was given.

25 19. Wherever under these rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of either Court, it shall be made in the first instance to the Court or Judge below."

30 Rules 18 and 19, above, correspond to rules 16 and 17 of Order 58 of the Rules of the Supreme Court in England, as they were in 1955 (see The Annual Practice, 1955, pp. 1283, 1286); the said English rules read as follows:-

35 "16. An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the Court appealed from, or any Judge thereof, or the Court of Appeal, may order; and no intermediate act or proceeding shall be invalidated, except so far as the Court appealed from or the Court of Appeal may direct.

17. Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal, or to a Judge of the Court below or of the Court of Appeal, it shall be made in the first instance to the Court or Judge below." 5

It is clear from a comparison of our rule 18 with the English rule 16, that in England a Judge of the Court of Appeal sitting alone could not grant a stay of execution, whereas here in Cyprus such a course appears to be possible.

I have, therefore, reached the conclusion that I possess jurisdiction to deal with the present application. 10

The corresponding provision in force now in England is rule 13 of Order 59 of the Rules of the Supreme Court (see The Supreme Court Practice, 1976, vol. 1, pp. 879, 880); this rule reads as follows:- 15

" 13.-(1) Except so far as the court below or the Court of Appeal may otherwise direct -

(a) an appeal shall not operate as a stay of execution or of proceedings under the decision of the court below; 20

(b) no intermediate act or proceeding shall be invalidated by an appeal.

(2) On an appeal from the High Court, interest for such time as execution has been delayed by the appeal shall be allowed unless the Court otherwise orders." 25

In spite of the differences in wording between our rule 18 of Order 35, the previous rule 16 of Order 58 in England and the present rule 13 of Order 59 in England, it appears that the principles governing the exercise of judicial discretion in a matter of this nature have remained unchanged; and they are set out in The Supreme Court Practice, 1976, *supra*, at p. 880. 30

In brief, they are that though it is not the practice to deprive a successful litigant of the fruits of his litigation pending an appeal, on the other hand, when a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory; thus there will be granted 35

a stay of execution, pending appeal, where the special circumstances of the case so require.

5 It has been laid down that a matter of this nature is purely a matter of discretion, depending on the particular circumstances of each case (see *The Ratata*, [1897] P. 118, 132); and it is, also, well settled that the approach to such a matter is the same as in other cases even when stay of execution pending appeal is sought in admiralty proceedings; in other words, the same principles apply to a stay of execution pending appeal in admiralty proceedings as to a stay of execution pending appeal in other proceedings (see, in this respect, *The Annot Lyle*, [1886] 11 P. 114, 116).

15 I have paid due regard to all that has been submitted by learned counsel on both sides in relation to how I should exercise my relevant discretionary powers in the present instance.

20 The first consideration which I have borne in mind and which, actually, was not fully argued by either counsel, is that it is not, at all, certain that an appeal lies against the directions made by the trial Judge on this occasion. There is no doubt that an appeal lies, under section 11 (2) of Law 33/64, against a final *decision*, or, presumably, even an interim *decision*, of a Judge of this Court given when dealing with an admiralty action on his own; but, in the Rules of the Supreme Court of Cyprus in its Admiralty Jurisdiction, which were enacted by 25 The Cyprus Admiralty Jurisdiction Order, 1893 (see Subsidiary Legislation of Cyprus, vol. II, Rules of Court, p. 573, at p. 593), the following provision is made by rule 165:

30 " 165. Save where by these Rules is otherwise provided, any party may apply to the Court to review any order made by a Judge not being a final order or judgment disposing of the claim in the action."

35 It does seem to me, as at present advised, that, the proper in the circumstances remedy against the directions, by way of an order made by the trial Judge on March 24, 1978, was an application for review, under the just quoted rule 165, and not an appeal, such as the one in relation to which the present application for stay of execution has been made.

Secondly, a decisive factor, in my opinion, is that these directions were made for the purpose of ensuring the execution of an order which was made, by consent, in admiralty action No. 232/77 for the release of the respondent cargo, on December 12, 1977. In relation to the making of this order the matter was brought before the Full Bench of the Court on appeal (see C.As. Nos. 5783 and 5795) and by a judgment given on March 16, 1978, it was found that the trial Judge did make an order by consent, for the release of the cargo concerned, on the basis of statements made before him on the date in question by counsel for the parties, which are the same as the parties in the application now before me.

If counsel appearing for the appellants, who are the shipowners of the ship in which the cargo was brought to Cyprus, wanted to guard against any of the possible adverse contingencies which have been raised before me in the course of arguing in support of this application for stay of execution, the proper time to raise such matters was when the statements which led to the making of the aforementioned order by consent, for the release of the cargo, were made. But, at that time, none of such matters appears to have been raised; and the shipowners—the appellants—gave the impression, through counsel who was appearing for them at the time and who is not the same as counsel appearing for them now, that they were satisfied only with the lodgment of security in relation to the release of the cargo.

Having been a member of the Full Bench of this Court, which has dealt with the aforesaid Civil Appeals Nos. 5783 and 5795, I am not only entitled, but bound, to take judicial notice of the relevant circumstances in which this cargo has come to be still in Cyprus and its fate to be shrouded in uncertainty due to the delay in the execution of the order for its release which was made by consent, on December 12, 1977.

Bearing all the above, as well as other relevant considerations, in mind, I have decided against exercising my discretion in favour of the appellants and I have decided to refuse an order for a stay of execution of the appealed from directions which were given by the trial Judge on March 24, 1978.

I would like, before concluding, to say that I do not regard the fact that in the same admiralty action there is still pending



an application made on February 6, 1978, by the respondent in this appeal, for directions, *inter alia*, in respect of the release of the cargo, and that in relation to such application judgment was reserved after a lengthy hearing of the parties by the trial Judge, as a sufficient reason for granting the stay of execution sought in the present appeal; especially, as subsequently to reserving judgment on that application, the trial Judge did give directions, applied for by the Marshal, concerning the release of the cargo, on March 24, 1978; and the fact that he did not hear, on that occasion, the parties, is not, really, of any decisive importance, in my opinion, because, as already stated, the parties were heard at length in relation to the aforesaid application of February 6, 1978, before judgment was reserved by the trial Judge.

It is open, of course, to the appellants to seek any other remedy that is available to them in order to guard against the dangers or hardships which, allegedly, might arise as a result of the carrying out of the directions made by the trial Judge on March 24, 1978, prior to the determination of the present appeal.

This application for a stay of execution has failed; but, in the light of all relevant circumstances, I have decided to make no order as to its costs.

*Application dismissed. No order as to costs.*

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